The Madras Law Journal.

VOL. XXII.] MARCH, 1912. [PART VI.

JOTTINGS AND CUTTINGS.

The Judge's Tone of Voice.—In a recent case in Massachusetts, in an action for personal injuries, it was urged as a ground for a new trial that the accent of the charge of the judge was such as to prejudice the plaintiff. But the Supreme Court replied: "The tone of voice of a presiding justice is not subject to exception, unless some error of law is committed"—*The American Law Rveiew.*

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Injunction Against Wife carrying on business without Husband's permission.—Certainly a novel form of litigation between husband and wife was that in the recent Michigan case of *Root* v. *Root.*[1] The parties were married in 1890 and ten years after the marriage they lived at various places; the husband being engaged a part of the time as a teacher and later as a piano salesman. In 1900 they located in Ann Arbor, where with a capital of about $ 300 they opened a small store in which they handled pianos, sheet music, and musical merchandise. The business seems to have prospered from the start. Both husband and wife were untiring in their labors, and the success which crowned their efforts seems to have been attributable to both. Then came misunderstandings and quarrels, arising from the wife desiring to control the business. The end of it was that she left home and started a similar business on her own account in the same town. Now comes the husband and files a bill against the wife, averring his ability and willingness to properly support her and praying that she be enjoined from continuing against his will the competitive business established by her. The wife admitted the establishment of the rival business, but charged that her husband had driven her from her home, and it became necessary for her to do something for her own support. She further filed a cross-bill, charging him with extreme cruelty, and praying for a divorce. The Supreme Court dismissed the cross-bill, because it found that there was nothing to justify a decree of divorce, but granted the injunction asked for by the husband. The husband, said the court, is bound in law to support his wife in a manner reasonably consistent with his means and station. As a

1 180 N. W. 194.

necessary corollary it follows that the husband as a matter of law is entitled to the services and society of his wife. That the wife may with the husband's consent conduct a business upon her own account is not open to question, but no case has been found and none are cited by counsel which affirms this right in the wife, where her husband is able and willing to support her and withholds his consent. In a previous case in this state, in considering the question of partnership between husband and wife, it was said: "The important and sacred relations between husband and wife, which lie at the very foundation of civilized society, are not to be disturbed and destroyed by contentions which may arise from such a community of property and a joint power of disposal and a mutual liability for the contracts and obligations of each other." If a contract of partnership, with its consequent complications, is liable to imperil the marital relations, it is obvious, concluded the court, that active business competition between husband and wife would, of necessity, utterly annihilate it.—*The American Law Review.*

* * *

Insurance—Life—Defense of Suicide.—Where the insured commits suicide while sane, after the expiration of one year from the date of the policy, the company is liable for the amount of the policy, even though it appeared that the act of the suicide was premeditated before the expiration of one year from the date of the policy, and even though the date of the liability of the company is fixed by the voluntary act of the insured, this being one of the risks assumed by the company, whereas in this case the policy contains a provision that the company shall not be liable in the event of the insured's death by his own act, whether sane or insane, during the period of one year after the issuance of the policy. *Harrington v. Ins. Co.*, 131 N. W. 246. (N. D.)—*Ibid.*

* * *

Joint and Several Liabilities—Settlement by One Tort Feasor.—Settlement with one of several joint wrong-doers and payment of damages is not a defense to an action against another, unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered. If the settlement is in writing, oral evidence is competent to show the intenion of the parties thereto in an action against one not a party to the settlement. Affixing a private seal to such writing is without effect. *Fitzgerald v. Union Stock Yards Co.*, 131 N. W. 246. (Neb.) Note 73 Cent. L. J. 246.—*Ibid.*

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OCCASIONAL NOTE.

We understand that the Madras Trades Association has made a representation to the Local Government protesting against the appointment of Indians to the Chief Judgeship of the Small Cause Court and recommending that more European Barristers should be appointed to judicial and legal offices. Leaving the question as to the credentials of this association representing the trading interests for a moment, we may consider the reasons stated by the association for their representation.

It is stated that by reason of the Vakils being permitted to practise in the Original Side of this High Court the European Barristers have died out owing to this unfair competition. We do not understand what the association means by unfair competition. Does the association mean that giving equal chances to two competitors is giving unfair competition to one of them? The Trades Association forgets that there is no fair chance given to the Vakils except in the matter of practising in courts. The European Barristers had always the monopoly of all offices connected with law from the beginning. Even now the European Barristers can be counted by numbers and their monopoly in respect of sinecure offices has not ceased. The Administrator-Generalship is held by a European Barrister. One at any rate of the two Law Reporters is a European Barrister. The Crown Prosecutor is a European Barrister. The Deputy Registrarship of the Appellate Side is held by a European Barrister. The Principal, Law College, is a European Barrister. So also European Attorneys have the monopoly of other equally profitable offices. The Official Assignee is a European Attorney and the Government Solicitorship is also held by another European Attorney. There is only one Native Barrister holding the office of the Secretary to the Rules Committee carrying a pittance of 100 Rupees only per month. One of the Assistant Registrars is a Native Attorney. And even in the matter of

appointments the Native Barristers though more numerous than the Europeans are left in the cold. There is probably one or two Europeans left unprovided for. Excepting these there is no one for the Trades Association to support. The European Barristers thus possess this advantage of holding the monopoly of offices, sinecure and otherwise. If, notwithstanding this fact, if these European Barristers have not thrived in the profession who has the unfairness in competition the public may be left to judge. The Trades Association suggests that only a Barrister coming from home can maintain the traditions of the Bar. The Bar in this country has existed long enough, and it has maintained its traditions and can maintain them without any need of help from a briefless Barrister from England or Scotland.

The complaint of the Trades Association as against an Indian Barrister cannot be understood. The association itself admits that there are very few cases in which Europeans are parties. Even supposing that Europeans are parties in a large number of cases, why should the Small Cause Court have an European Barrister and not an Indian Barrister? Does it suggest that the Indian Barrister does not know the English law or the Indian law. Even if a European is appointed, it does not follow that the cases in which Europeans are parties will be tried by them. The representation should therefore be that not merely there should be a European Judge but that he should have exclusive jurisdiction to try cases in which Europeans are parties.

CRITICAL NOTE.

LIMITATION *RE* SUITS RELATING TO ADOPTION.

Muhammad Umarkhan v. *Muhammad Niazuddin Khan* [1]—
ARTS. 118 AND 119 LIMITATION ACT.

The vexed question as to the applicability of Arts. 118 and 119 of the Limitation Act of 1877 and 1908 to suits for possession has at last been set at rest by the Privy Council in *Thakur Tribhuvan Bahadur Singh* v. *Raja Rameshar Bahadur Singh* [2] and in more explicit and emphatic terms by its decision in *Muhammad Umarkhan* v. *Muhammad Niazuddin Khan* [1]. We shall shortly deal with the conflict among the several High

1. (1911) 22 M.L.J. 240. 2. (1906) I.L.R. 28 A. 727 (P. C.)

Courts in India consequent on their differing interpretations of the *Jagadamba Case*[1] and the cases in *Mohesh Narain Munshi* v. *Taruck Nath Moitra*[2] and *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar*[3] that followed the Jagadamba case, and we hope that a short history of the conflict will interest our readers at least as a matter of history.

The *Jagadamba Chaudhurani's case*[1] turned upon Art. 129 of the Limitation Act, IX of 1871. Their Lordships did not in that case decide anything on the construction of Art. 118 of Act XV of 1877. But, on the other hand, they expressly guarded themselves from expressing any opinion on it.

The Articles of the Limitation Acts of 1871 and 1877 ran as follows:—

Art. 129 *of Act IX of* 1871.

Description of suit.	Period of limitation.	Time from which period begins to run.
129. To establish or set aside an adoption,	12 years.	The date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father.

Art. 118, 119, *of Act XV of* 1877 *and of Act IX of* 1908.

Description of suit.	Period of limitation.	Time from which period begins to run.
118. To obtain a declaration that an alleged adoption is invalid or never in fact took place.	6 years	When the alleged adoption becomes known to the plaintiff.
119. To obtain a declaration that an adoption is valid.	6 years.	When the rights of the adopted son as such are interfered with.

Act IX of 1908 retains the Articles 118 and 119 of Act XV of 1877 in the same state, though it has been urged more than once by the High Courts that it would be better if the Legislature would intervene and make the point clear—see *Ratnamasari* v *Akilandammal*[4].

Subsequent to the judgment in the *Jagadamba case*[1] the second case of the Privy Council was the case reported in *Mohesh Narain Munshi* v. *Taruck Nath Moitra*[2] which was

1. (1886) I.L.R. 13 C. 308. 2. (1892) I.L.R. 20 C. 487=20 I.A. 30.
3. (1894) I.L.R. 22 C. 609=22 I.A. 51.
4. (1902) I.L.R. 26 M. 291 at p. 314, 321.

also a case under Art. 129 of the Act of 1871 wherein their Lordships, in the course of their judgment, referring to the argument that Art. 118 of the Act of 1877 applied, expressed themselves as follows:—

"It was suggested that the Act of 1871, having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the later statute, in which the language used is somewhat different, the suit there referred to as necessary to save limitation being described as one to obtain a declaration that an alleged adoption is invalid or never in fact took place. * * *It seems to be more than doubtful whether, if these were the words of the statute applicable to the case* (*i.e.*, the words of Art. 118) *the plaintiff would thereby take any advantage.*" This passage was on the one hand construed to mean by the Calcutta and the Allahabad High Court thus:—

"We do not think that the concluding sentence in the above passage, which is only a *dictum* in guarded language and not a decided opinion of their Lordships, bears out the appellant's contention that the change in language adopted in Articles 118 and 119 of Act XV of 1877 has not effected any change in the law. What their Lordships considered to be more than doubtful even if the language of the old law (Article 129 of Act IX of 1877) were the same as that of the present law (Art. 118 of Act XV of 1877) was not whether that would make any change in the law, but whether the plaintiff would take any advantage, that is, whether the plaintiff in the case before their Lordships would succeed under the circumstances of the case. That this is the meaning of the above passage appears to us to be clear, not only from the language used, but also from the fact that the High Court held that the suit was barred by adverse possession, and their Lordships in an earlier part of the judgment say that they decide the question upon the construction of Article 129 of Act IX of 1871 without expressing any dissent from the view of the High Court that the suit was barred by adverse possession." *Jagannath Prasad Gupta* v. *Runjit Singh* [1]. See also *Ramchandra Mukerjie* v. *Ranjit Singh*[2]; *Lali* v. *Murlidhar* [3];

1. (1897) I.L.R. 25 C. 354 at 363. 2. (1899) I.L.R. 27 C. 242.
3. (1901) I.L.R. 24 A. 195 at 197.

Chandania v. *Salig Ram* [1] with regard to this explanation of the *obiter* in *Mohesh Narain Munshi* v. *Taruck Nath Moitra*[2].

Mr. Justice *Bhashyam Aiyangar* in his dissenting judgment in *Ratnamasari* v. *Akilandammal* [3] said with regard to the explanation of the passage by the Calcutta High Court above thus:—"It is possible that this may be the right interpretation, but I am by no means convinced of it, and I prefer to construe it as it has been construed both by this court and by the Bombay High Court, *viz.*, that in the opinion of the Judicial Committee, whose judgment was delivered by Lord *Shand*, it was more than doubtful whether, if the language of Art. 129 of Act IX of 1871 had been the same as that of Art. 118 of the Act of 1877, the result would have been different, that is, whether the plaintiff's suit would not have been barred by limitation. Assuming this to be the correct interpretation of the passage, what does this amount to? It amounts only to the expression of a doubt, and no more than a strong doubt as to whether Article 118 may not apply to a suit which is not merely one for declaration of the invalidity of the defendant's adoption. The expression of such doubt cannot be regarded as carrying the weight of even an *obiter dictum*, which must at least be the expression of an *opinion* by the way." *Ratnamasari* v. *Akilandammal* [3].

The third case before the Privy Council was *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar* [4] wherein the adoption was not to the last male owner of the estate which was the subject matter of the suit and their Lordships held that Art. 118 did not apply to the case. Even on the assumption that Article 118 would otherwise apply, they held that the article would be no bar in the absence of proof of knowledge of the asserted title by reason of adoption, six years prior to suit. The case in *Jagadamba Choodhrani* v. *Dakina Mohun Roy* [5] was in a way explained by the Privy Council in *Malkarjun* v. *Narahari* [6]. It is upon the difference in the understanding of the first three cases by the several High Courts that the divergence in the several courts came to happen.

1. (1903) I.L.R. 26 A. 40 at 54.
2. (1892) I.L.R. 20 C. 487=20 I.A. 30.
3. (1902) I.L.R. 26 M. 291 F.B.
4. (1894) I.L.R. 22 C. 609.
5. (1886) I.L.R. 13 C. 308.
6. (1900) I.L.R. 25 B. 337.

The Bombay High Court understood the Privy Council to say that there was no difference effected in the law by the new wording of Articles 118 and 119 in Act XV of 1877 and that the articles applied to all cases including suits for possession wherein to establish title by declaring an adoption valid or invalid is a necessary step for a decree in favor of the plaintiff. See *Shriniva*) v. *Hanmant* [1]; *Barot Naran* v. *Barot Jesangh* [2]; *Ramachandra* v. *Narayan* [3]; *Laxmana* v. *Ramappa* [4]. The Madras High Court was also of the same view—*Parvathi Ammal* v. *Saminatha Gurappah* [5]; *Ratnamasari* v. *Akilandammal* [6]. In the latter case Mr. Justice *Bhashyam Aiyangar* delivered a dissenting judgment which went into the question very exhaustively and in detail. The Calcutta and the Allahabad High Courts took the contrary view that Arts. 118 and 119 were applicable only to declaratory suits under S. 42 of the Specific Relief Act (see Ill. *fs* and that the Legislature had in mind in framing the articles and cutting down the periods from 12 years in Art. 129 of the Act of 1871 to six years (in Art. 118 and 119 of the Act of 1877) the provisions of S. 42 of the Specific Relief Act which they had passed in the same year (1877) just a few months before; see *Jagannath Prasad Gupta* v. *Ranjit Singh* [7]; *Ramchandra Mukerjie* v. *Ranjit Singh* [8]: *Baikantachandra Roy Chowdhury* v. *Kalicharan Roy* [9]; *Basdeo* v. *Gopal* [10]; *Ganga Sahai* v. *Lekhraj Singh* [11]; *Ghandarap Singh* v. *Lachman Singh* [12]; *Natthu Singh* v. *Gulab Singh* [13]; *Lali* v. *Murlidhar* [14]; *Chandania* v. *Salig Ram* [15]. It is enough, we think, for the present purpose to briefly indicate in the words of Mr. Justice *Bhashyam Aiyengar* the basis of his own view which was the one adopted by the Calcutta and the Allahabad High Courts. "Taking into consideration that the expressions establish and set aside were dropped in Arts. 118 and 119 and that the language descriptive of the two classes of suits is iden-

1. (1899) I.L.R. 24 B. 260.
2. (1900) I.L.R. 25 B. 26.
3. (1903) I.L.R. 27 B. 614.
4. (1907) I.L.R. 32 B. 7.
5. (1896) I.L.R. 20 M. 40.
6. (1902) I.L.R. 26 M. 291 at p. 305.
7. (1897) I.L.R. 25 C. 354 at 363.
8. (1899) I.L.R. 27 C. 242
9. (1904) 9 C.W.N. 222.
10. (1886) I.L.R. 8 A. 644.
11. (1886) I.L.R. 9 A. 253.
12. (1888) I.L.R. 10 A. 485.
13. (1895) I. L. R. 17 A. 167.
14. (1901) I.L.R. 24 A. 195 at 197.
15. (1903) I.L.R. 26 A. 40 at 54.

tical with the language of S. 42 of the Specific Relief Act and illustration (*f*) thereto and that the period of twelve years was reduced to six years, which was the period generally applicable to suits for mere declaration under Act XIV of 1879 and was the period applied to suits for declaration in respect of adoption under that Act *Mrinomoyce Debia* v. *Bhoobunmoyce Debia*[1], it is impossible to resist the conclusion that the Legislature deliberately departed from the policy of Art. 129 of the Act of 1871 and confined the operation of Arts. 118 and 119 of the new Act to mere declaratory suits as defined in S. 42 of the Specific Relief Act. It is most unlikely that the change of policy was only to reduce to six years the period of twelve years provided by the Act of 1871 (Art. 129) and to fix a different starting point."

In this state of conflict among the several High Courts in India, the decision in *Thakur Tribhuvan Bahadur Singh* v. *Raja Rameshar Bahadur Singh*[2] (the 4th Privy Council case on the point) was passed by the Privy Council. The Madras High Court construed it to be a definite pronouncement on the vexed question settling the matter against the Bombay view and the view of the majority in Madras and in favor of the Calcutta and Allahabad view, see *Velaga Mangamma* v. *Bundlamudi Veerayya*[3]. The matter did not come up for consideration by the Bombay High Court after the said decision in *Thakur Tribhuvan Bahadur Singh* v. *Raja Rameshar Bahadur Singh*[2] was passed. In December 1911, the interpretation put by the Madras High Court in *Velage Mangamma* v. *Bundlamudi Veerayya*[3] as regards the Privy Council decision in *Thakur Tribhuvan Bahadur Singh* v. *Raja Rameshar Bahadur Singh*[2] received confirmation from the Judicial Committee in their decision under notice in *Umar Khan* v. *Niazuddin Khan*[4] wherein their Lordships emphatically say :

"Although their Lordships consider that the question of adoption was an immaterial issue, they think it advisable to say that the omission to bring, within the period prescribed by Art. 118 of the second schedule of the Indian Limitation Act, 1877,

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1. (1874) 23 W.R.C.R. 42 at p. 44. 2. (1906) I. L. R. 28 A. 727 (P.C.)
3. (1907) I.L.R. 30 M. 308=17 M.L.J. 282. 4. (1911) 22 M.L.J. 240.

a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakur Tirbhuvan Bahadur Singh v. Raja Rameshar Bahodur Singh*[1].

In this view so authoritatively pronounced by the Judicial Committee on the construction of Art. 118, the vexed question of the applicability of Arts. 118 and 119 of the Limitation Act to suits for possession wherein it may be necessary to get over or to establish an alleged title by adoption has been after long conflict among the several High Courts set at rest and the *quietus* has been given to all the controversy that ranged round the interpretation of the *Jagadamba case*[2] and the cases that followed that case.

JOTTINGS AND CUTTINGS.

Sex of accused—Presumptions.—Where, on the trial of accused, his sex was not made an issue, but was accepted by all as a conceded fact, and he repeatedly responded to masculine pronouns addressed to him, the jury were authorized to presume that he was a male person, and hence he could not obtain a reversal of a conviction of living with and accepting the earnings of a common prostitute because his sex had not been proved. *State v. Risaburo.* 112 Pac. 85. (Wash.)—*The American Law Review.*

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False Pretenses—Intent to Cheat and Defraud—Definition.—1. The intent to cheat and defraud is an essential element of the offense of obtaining property, etc., under false pretenses, and must be proved, though proof may be either by direct or circumstantial evidence. 2. A "false pretense" is such a fraudulent representation of a fact by one knowing it to be untrue as is adapted to induce the one to whom it is made to part with something of value. It may consist of any act, word, symbol, or token calculated to deceive another, and knowingly and designedly employed by any person with intent to defraud another of money or other personal property. *State v. Holden.* 99 A. 215. (Del.)—*Ibid.*

1. (1906) I. L. R. 28 A. 727 (P. C.) 2. (1886) I. L. R. 13 C. 308.

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THE LATE HON'BLE MR. V. KRISHNASWAMI AIYAR, C.S.I.

The late Hon'ble Mr. V. Krishnaswami Aiyar, C.S.I., whose sad and untimely death the whole country had recently to deplore, was born in June 1863 in Tiruvadamaruthoor, otherwise called Madhiarjanam, a village a few miles from Kumbakonam. He was the second son of his father Mr. Venkatramier who at the time of his son's birth was a ministerial officer in the District Court of Tanjore on a small pay and became ultimately a District Munsif. The father was a learned Sanskrit scholar and thoroughly orthodox. The deceased, along with his elder brother, the late V. Swaminatha Aiyar, learned the rudiments of education in an English school and afterwards entered a feeder school of the S. P. G. College, Tanjore. He there read under the able guidance of Mr. Marsh, the then Principal of the S. P. G. College and a famous educationist, whom the deceased held in high esteem until his death. From the father the two sons imbibed a great taste in Sanskrit literature. In consequence of his brother joining the Kumbakonam College for continuing his college course the deceased went to Kumbakonam and passed his Matriculation Examination as fourth in the list. The Kumbakonam College was at this time manned by two veteran educationists, Messrs. Porter and Gopal Rao, from whom the deceased imbibed a taste for the study of English literature. During his second year of the F. A. course he was transferred to the Presidency College where his brother was studying for the B. A. course. In the Presidency College he obtained the Elphinstone Scholarship for standing high in that College in the First in Arts Examination of 1879 and besides obtained the Innes prize for general proficiency in English.

He graduated in Arts in the year 1882, standing fairly high in the University Examination, and obtained the Travancore Maharajah's prize in Logic and Morals. He then studied for Law, took his degree in 1884, and, after undergoing an apprentice course under the late Mr. R. Balajee Rao, was enrolled as a Vakil of the High Court in 1885. He had to wait, as others like him, for some considerable time. But from 1895 his practice became settled and ever since he began to rise in the profession. During this period of waiting when he had to struggle for success in the profession he became acquainted with Mr. (now Sir) S. Subrahmanya Aiyar who had then settled in Madras for practice and who was well known for helping and bringing into prominence capable juniors, and this acquaintance soon ripened into cordial friendship. His sense of professional rectitude was high and he laid before him a lofty and noble ideal of duty to the profession and to the public which he always strove to realize to the best of his ability. He displayed from the first an originality for organization and always evinced a desire to establish institutions which he was sagacious enough to discover as conducive either to the welfare of the profession or of the public, and whenever he determined upon a particular course he would carry it out even in the teeth of any opposition. It is to him that we owe the formation of the Vakils' Association of which we may say he was the founder or originator and of which he had been its trusted and popular Secretary for a long time. To him along with three others was also due the happy idea of starting a Law Journal for the first time in India and the *Madras Law Journal* owes a great deal to him for its success and popularity. Even when owing to his practice having increased by leaps and bounds his time was engrossed in professional and other work, he could find time, if wanted, to write criticisms of decided cases and articles, and up to the day of his death he evinced the greatest interest and solicitude for the welfare and reputation of this journal. Associations like the Dharma Rakshana Sabha, the South Indian Association, The Indian Bank, the Mylapur Club, are other instances of his genius for conceiving, establishing and promoting institutions calculated to further public welfare. Indeed the great characteristic which distinguished him from others of his contemporaries and placed him above all was his unbounded energy and aptitude for

multifarious kinds of work at the same time. Nobody in his time could have turned out so much of work, and that of a high order, as was turned out by the late Hon'ble Mr. V. Krishnaswami Aiyar. He had the remarkable capacity to attend to his professional work and at the same time to attend to his numerous other public duties. He had such concentration of mind as enabled him at the same time to receive instructions from his juniors in a case, to hear what was going on with reference to Congress and other work, to direct those responsible for further work, to dictate letters or to guide in other ways the work of Sabhas and Societies with which he was connected, to write letters in his own hand either to friends or public men in India or in England in cases where such personal writing was necessary, to correct head notes of the reports of Madras cases in his capacity as member for the Law Reporting Council, and to give directions to the Law Journal. His success of course was due to the fact that in most of these he employed those whom he thought he was right in trusting and indeed it was another trait of his character to find out capable men and trust in them when, in his opinion, they were fit to be trusted. He did much useful work to the public in various ways. As a member of the Senate and of the Syndicate he was immensely useful to the cause of education and he was chiefly instrumental in the framing of the regulations. As a member of the Legislative Council he did much useful work and took a bold and independent stand in respect of all matters coming before the Council. In the Congress also he did much useful work and it was through his energy that the Congress held in Madras in 1908 became a complete success and a trying situation was saved. He had an utter dislike for all cant and sham and his vehemence was very often mistaken for loss of temper. His character was of spotless purity and his patriotism and desire to promote the cause of his motherland were unbounded. He had the peculiar knack of winning back popularity although he might have been taken to have lost it before. Although his outspokenness and roughness of manner may have created some enemies yet his honesty of purpose always stood in his favour and always won for him the unstinted admiration of even

those whose ways of thinking were different from his. While he was an ardent admirer of everything that was best in the West he was not one of those who thought there was nothing good in things of the East. He was a passionate admirer of our past. He was thoroughly religious and acted upon the principle that he was working not merely for his own self but also for his country and the public, and this trait of his life and character would furnish the clue to those innumerable benefactions which are associated with his name.

Upon his success in the Bar it is not necessary to dilate. The Chief Justice and the Advocate General referred to this when the High Court was assembled on the day of his death to pay tribute to his memory. It is sufficient to say that he was found a match for opposing one of the greatest advocates and jurists that India has ever produced—the late Sir V. Bhashyam Iyengar.

Mr. Krishnaswami Aiyar had not merely a firm grasp of principles of law but also a complete and extensive knowledge of precedents or case law. His quickness of comprehension of the most complicated facts was wonderful and his presentation of facts before the court was singularly attractive.

Barring Sir S. Subrahmanya Aiyar, who is well known for his powerful, impressive and eloquent speeches, Mr. Krishnaswami Aiyar was the only one among the Vakils, and it may be said of the Bar in Madras generally, who was gifted with genuine eloquence. He did much to raise the prestige of the profession to which he belonged, and when the late Sir V. Bhashyam Iyengar died, his loss and those of a few like him was not in any way regarded as irretrievable for the position of the Vakil bar. Indeed his acceptance of the office of Judge was regarded by some of his friends as a great surprise and but for the fell disease to which he afterwards succumbed and certain circumstances of his domestic life he would not have accepted the office of the Judge of the High Court. We are not among those who think that there is a call to duty when there is an offer of a Judgeship of the High Court so that such offer should not be

refused but must be accepted even if by the acceptance of such an office the position of the bar to which he belongs will be prejudicially affected and there will be a loss to the profession and the public. After all the office of a Judge of the High Court in these days is not so tempting as lay people may seem to imagine except to those who prefer a settled income or are afraid of a possible turn in the fortunes of the profession or are attracted by the so-called dignity, which, we are sorry to say, has yet a great glamour with many of our countrymen. We are told that in England the leading members of the Bar never refuse Judgeships if offered. We, however, very much doubt this fact. If leading members of the bar in England were asked to accept the office of an ordinary Judgeship of the High Court of Justice or if leading counsel expecting to become Lord Chancellors of England were asked to accept the office of Lord Justice of Appeal or even a Master of the Rolls it is absurd to suppose that such members or counsel are bound to accept the offer. We think the time is come for leading members of the bar in this country to refuse the office of Judgeship of the High Court, especially when this country requires strong, powerful and bold advocates among the profession.

His career as a High Court Judge was very short. Hence it would be impossible to say that he was a great Judge. There are about eighty judgments reported in the series, and there are other judgments, not less than one-half that number, reported in unauthorized publications. Excepting in a few instances there was not much opportunity for a display of his erudition and research in his judgments. His great characteristic as a Judge was the extreme facility with which he formed his opinion and the extreme facility with which he pronounced his judgments. In fact as soon as he entered upon his duties he initiated the practice of pronouncing oral judgments even in appellate side matters. The arrears shewed a considerable decline, and practically the office found considerable difficulty in keeping pace with the making of cases ready for hearing, but, although the cases were decided quickly, he never shewed any want of readiness to listen to arguments if they were helpful in arriving at a

correct decision. It must, however, be said that owing to a lack of sufficient acquaintance with his nature many junior members of the bar (and it may be some of the senior members also) considered themselves aggrieved on the ground that all they had to say could not be freely presented before him. He tried during his tenure of office as Judge to make the law certain as there could be no worse feature in the administration of justice than the uncertainty of law. With this object in view, he would always refer to a Full Bench any question upon which there was a conflict of opinion in order that the Full Bench may give an authoritative decision. In most of these Full Bench cases he himself took a part. No one was more conscious than he of his weakness of temper, and he endeavoured, with all the strength and resoluteness of will that he was capable of, to put it down. Again no one was more ready than he to acknowledge the incorrectness of a position when he found it in the course of writing his judgments or even in the course of delivering the same. The short space of fifteen months as a Judge did not, however, give him sufficient opportunities for exhibiting all his capabilities, and thus there will be no useful purpose served, and in fact there are no data for it, by comparing him with his predecessors, although there can be no denying that, so far as his colleagues were concerned, he was one of the best and ablest among them.

As regards his work in the Executive Council the testimony borne by the Hon'ble Mr. J. N. Atkinson, a colleague in Council of the late Mr. Krishnaswami Iyer, in his speech before the public meeting assembled to commemorate his memory speaks volumes for his ability, quickness of grasp and the great tact he brought to bear in the discharge of the arduous duties of his high office.

The task of an Indian called to the high office of a Member of the Executive Government--an office now thrown open to Indians—is no light one. Knowing, as we do, that the late Mr. Krishnaswami Aiyar's chief aim in accepting this office was mainly to demonstrate to the governing class and the British public the fitness of Indians for the post, we should say he

eminently fulfilled his aim. It was given only to those who moved with him intimately to know his methods of achievement of great and difficult things and that even among uncongenial and adverse surroundings, and to those who were privileged to know his work so intimately, it needs no special mention that he strove to do much good to his countrymen His notes of his future programme of work in the many directions in which he wished to effect reforms would serve his successors for decades, and if he had been spared to us for the full period of his term we feel no doubt that he would have been instrumental in effecting most if not all of them.

His was a great and brilliant example of a life begun amidst humble surroundings, fought out against severe odds and ended in the pinnacle of fame and fortune with a high reputation for unblemished character, private and public, and a lofty sense of patriotism confined not merely to theory but which expressed itself often in many deeds of sacrifice which would serve as an example for future generations of his countrymen. To borrow his own idea, it is not always necessary, to become great and good, that one should fawn and pay homage to the powers that be.

CRITICAL NOTE.

Adikesavulu *v.* Ramanujam.—I. L. R. 32 M. 512.

FORMS OF MARRIAGE UNDER HINDU LAW.

In this case, plaintiff brought the suit to recover the *stridhanam* properties of his wife who died without leaving issue. He claimed to be the heir on the footing that his marriage with the deceased was in the Brahma form. The 1st defendant, the father, and the 2nd defendant, the mother of the deceased, contended that the marriage was in the Asura form and that, therefore, they were the heirs. It was not disputed that if the marriage was in the Brahma form the plaintiff was the heir and if it was in the Asura form, one of the defendants and not the plaintiff would be the heir.

The judgment proceeds on the assumption that the parties were Sudras. Th[illegible] [illegible]aimed to be Vaisyas. According to the

evidence of the *Purohit* and the defence witnesses (which apparently the learned judges accept) there was no *Vivahahomam* and no *Saptapadi*. It was not contended, however, that the absence of these ceremonies invalidated the marriage. Ceremonies customary among the community to which the parties belonged were performed. A pagoda and 2½ fanams were paid at the time of *Vaknischayam* (betrothal). It was intended for the mother as "milk-cooly" or compensation for having suckled the daughter. Nothing was received by the bride's father; on the other hand, he made various presents to the bridegroom. At the time of giving away the daughter he was made to recite a *sloka* which is rendered thus: "I give thee Vishnu, the maiden decked with ornaments with the desire of conquering the world of Brahma." A form of *Panigrahanam* or taking of the hand was gone through. On these facts, the question was: To which of the various categories of Hindu Marriage did this marriage belong? Was it Brahma or was it Asura, or was it neither and what was the rule of succession? *Boddam* J., who tried the case, held that it was Asura and that, under the text of Yajnavalkya that admittedly governed the case, the property descended to the father. The Bench who heard the appeal were of a different opinion. They held that the marriage was Brahma, and that the property descended to the husband.

The text is in these terms: "Property of a married woman dying without issue married in the four forms of marriage beginning with Brahma goes to her husband; if she have issue, it descends to her daughters, but in the remaining forms (of nuptial ceremony) her property goes to her father and mother."[1] Of the forms of marriage usually enumerated in the Dharma Shastras, all but the Brahma and Asura forms are obsolete. Accordingly, if the enumerated forms exhaust the types of Hindu marriage all that has to be determined is whether the form in question is Asura or Brahma. As the presumption is that the Brahma is the prevailing type, if this marriage was not in the Asura form, it must have been in the Brahma, and this is the process of reasoning by which the learned judges arrived at the conclusion that the marriage was in the Brahma form. If, on the other hand, the right conclusion

1. अप्रजस्त्रीधनंभर्तुः ब्रह्मादिषु चतुर्ष्वपि ।
दुहितॄणां प्रसूताचेच्छेषेषु पितृगामि तत् ॥

is that the Hindu Law contemplates forms of marriage other than those enumerated in the texts, the discussion might have to cover a somewhat wider ground ; we would have to determine to which of the many possible categories the form in question belongs ; in addition we would have also to determine, if it happened not to be in one of the enumerated forms, whether the text of Yajnavalkya supplies the law for the case or whether we have not got to look to custom for the purpose.

We may dispose of the last question first. There might be considerable difficulty in arriving at a conclusion as to whether the enumeration of the forms of marriage was intended to be exhaustive or was only illustrative. But once the conclusion is arrived at that it is illustrative there would be no difficulty in applying the text of Yajnavalkya to the case. The words of the text are perfectly general. If the marriage is not in one of the approved forms, the property is to go to the father. No doubt the *Mitakshara* presents some difficulty. In commenting upon the second part of the text, Vignaneswara enumerates the other forms of marriage as if they exhausted all the kinds of marriage to which the text would apply. But against his statement we may be permitted to use, having regard to the generality of the text, his celebrated argument in another connection, namely, that it is only "the affirmation of a smaller number and not the denial of a larger." He had to do only with the Shastraic kinds of marriage and he dealt with them. But that is no reason for saying that, in the absence of proved custom to the contrary, the rule contained in the text of Yajnavalkya is not to be applied to other forms of marriage.

According to Manu "the gift of the daughter clothed and decked to a man learned in the Veda, whom her father voluntarily invites and respectfully receives is the nuptial rite called Brahma."[1] According to Yajnavalkya, in the Brahma nuptials, the damsel is given by the father when he has decked her as elegantly as he can to the bridegroom whom he has invited[2]—उदकपूर्वकं "with water" as Vignaneswara adds. The gloss of Jagannatha on the word *Brahma* is "it is so called because it is proper for

1. Manu, Chapter III, verse 27; Banerjea Marriage and Stridhana, p. 75.

2. Colebrooke's Digest, Bk. V, v. 494.

Brahmans and the rest." According to Narada, "in the Brahma form, a maiden decked with ornaments is given to the bridegroom, after he has been invited and honorably received."[1] According to Apastamba "at the wedding called Brahma," the father "shall give away his daughter for bearing children and performing rites which must be performed together by a husband and his wife, after having inquired regarding the bridegroom's family, character, &c."[2] According to Gautama "if the father gives his daughter dressed in 2 garments and decked with ornaments to a person possessing sacred learning, of virtuous conduct, who has relatives and a good disposition, that is a Brahma wedding"[3]. These are some of the definitions of the Brahma type of marriage. Obviously the distinguishing feature of this marriage, as can be gathered from the above authorities, is gift of the bride with water to a Brahmin learned in the Veda. Other classes besides the Brahmins, acting upon the invitation to imitate contained in Manu, Chapter X, v. 127, have since come to adopt this form. Gift by water was a peculiarity of the marriage of a Brahmin—Manu, Chapter III, v. 25. The anxiety for the existence of *good qualities* in the bridegroom is the anxiety that the donor is asked to feel in the choice of the donee. "Acceptance" (प्रतिग्रह) is a mode of acceptance only for the Brahmin.[4] "When the bridegroom, having given as much wealth as he can afford to the father and paternal kinsmen and to the damsel herself, takes her voluntarily as his bride, that marriage is named Asura."[5] According to Yagnavalkya, an Asura marriage is contracted by receiving property from the bridegroom.[6] Simlarly Apastamba:—"If the suitor pays money for his bride according to his ability and marries her afterwards, that marriage is called Asura.[7] "If those who have (authority over) a female are propitiated by money (that is) an Asura wedding" says Gautama[8]. "Acceptance of a fee, be it small or great, is a sale of daughter"—that is Manu.[9] From these texts it is clear that the distinguishing feature of this

1. Narada, Chapter XII, 40.
2. Apastamba, Pr. II, p. 5, kh. 11, v. 17.
3. Gautama, Chapter IV, 6.
4. Yajnavalkya, Acharakanda v. 118.
5. Manu, Chapter III, v. 31; Banerjea, p. 78.
6. Colebrooke's Digest Bk. V, v. 499.
7. Apastamba, Pr. 2, pa. 5, kh. 12 v. 1.
8. Gautama, Chapter IV, 11.
9. Manu, Chap. III, 53.

form of marriage is the transfer of the bride for a consideration however small. The payment may be to the father, to the paternal kinsmen, or even to the bride herself. The method of the disposal of the gratuity is not a matter of consequence. For instance, one rendering of Gautama's text which regulates the succession of *sulka* allowed the fee to go to the brothers even during the lifetime of the bride—Mayne, para 81. The Shastras, however, do not prohibit the receipt of money to fulfil the law (Apastamba, Pr. II, pa. VI, kh. 13, v. 12). "Money or goods may be given to damsels, whose kinsmen receive them not for their own use but to return them in the shape of presents either to the bridegroom or the bride"[1]. "A man who through avarice takes the gratuity is a seller of offspring."[2] "The covert sale of a daughter for a fixed price is forbidden[3]." It is only in this sense that "even a Sudra ought not to take a nuptial fee when he gives away his daughter"[4]— We are told in the *Mahabharata*, Adi Parva, that Shalya had to accept a bride-price for his sister in fulfilment of the law. It is only if we view the prohibition in this light that the statement of Yajnavalkya that "the Asura is peculiar to the servile class" and the statement of Manu that "the sages state that Asura is approved of a Vaisya or Sudra"[5] (though the latter in his puritanic mood later on prohibits the rites themselves) becomes intelligible. It is stated in the *Mahabharata*, Parva I, 73 8-13, that Manu says that the Asura form is prescribed for Sudras. There is an appropriateness in the Asura form to the Sudras in that acceptance is a form of acquisition only to the Brahmin, just as there is an appropriateness in the Rakshasa form to the Kshatriyas to whom conquest is a mode of acquisition. It is a common enough phenomenon that when owing to higher ideals the substance vanishes the form still remains with its original legal consequences. The value of form in modern jurisprudence was illustrated in a recent Madras case where their Lordships pronounced a mortgage not to be an English mortgage because it did not take the form of ostensible sale though the same consequences were intended to flow as from

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1. Manu Chapter III, 54.
2. Manu Chap. III, 54.
3. Manu Chap. IX, 98.
4. Manu, Chap. VIII, v. 416.
5. Manu. Chap. III, 24.

an English mortgage. The growing sensitiveness to the imputation of "कन्याविक्रय" or sale of daughter appears to have assigned the price to the mother in this case. But in law it is nevertheless regarded as going to the father for "a wife, a son and a slave can never acquire any property for themselves; whatever they earn go to him to whom they belong."[1]

It would be an error to suppose that because the Dharma Shastras do not speak of the ceremonials of marriage, it was open to the parties to choose such forms as they were pleased to adopt. Individual choice was restricted to matters of option, "Vaikalpika Vishaya" as Vignaneswara points out in his commentary on the verse "श्रुतिस्मृतिः सदाचार :" &c.—Acharakanda, verse 7. As an illustration of this he gives "Garbhashtame Ashtame Vabde" (=the Upanayana may be performed in the eighth year including gestation or from birth). On the other hand he winds up his commentary on "अविप्लुतब्रह्मचर्यो... स्त्रियमुद्वहेत् अनन्यपूर्विकां कान्तां असपिण्डाम्" by saying "परिणयेत् स्वगृह्योक्तोविधिता" *i.e.* he shall marry according to the rites of his Grahya. In other words, he directs that the Grihya Sutras are to be read as a supplement to the Dharma Shastras. Accordingly it has been laid down that in all forms of marriage the nuptial rites are necessary and that there can be no valid marriage without the substantial performance of the requisite religious ceremonies.[2] The same rites are observed in the Asura and the Brahma forms—Sarkar, p. 89 and 3 M.L.J. 269. Only the order is to be slightly different—see *Nirnaya Sindhu* anent marriage. The rites are set forth in great detail in the Sankhayana Grihya Sutras, Adhyaya 1, kh. 4, 11-18; Aswalayana, Adhyaya 1, kh. 1 *et seq*; Parasara Grihya Sutras, Kanda 1, Khandike 1, *et seq.*; similarly in Baudhayana and Apastamba Grihya Sutras[3]. Naturally among the ceremonies, some are considered more essential than the others. "The relation of wife is created by the texts pronounced when the girl is taken by the hand. Be it

1. Manu, Chap. IX, 98.

2. Trevelyan, p. 54; Strange 42, 393; Vyavastha Darpana, p. 648; 14 M. L.J., 318; 12 C, 140; 11 B. 247; Devala—Colebrooke's Digest Bk.III, 606; Jolly. p. 73; Asura—11 B. 247; 14 M. 316.

3. See Mandlik p. 401; Viyavastha Chandrika, Vol. II, p. 444; Colebrook, Asiatic Researches, Vol. VII, pp. 288—311; Ward's Hindu Law, Vol I, p. 13; Norton's L. C. App. A; Steele, p. 164.

known that those texts, according to the learned with the texts prescribed for walking seven steps"—Manu, Chap. VIII—229. According to Vasishta, "taking by the hand is indispensable." Yama says: "Not by the pouring of water nor by the words of gift is the relation of husband and wife formed but it is formed by the rite of taking the bride by the hand and when they walk together the seventh step."[1] There is nothing inherently impossible in applying these rites to the Sudras—see the discussion in *Madana Parijatha* in the chapter on शूद्रवृत्तिः Sudras are to perform the *samskaras* prescribed for Brahmins without the recitation of Vedic texts.[2] The Vedic mantras are neither necessary nor permitted in their case[3]. "With Mantra namas, the Sudra is to perform his Pancha Yajnas."[4] Where a Brahmin does a thing in Vaidika (consecrated) fire, the Sudra does it in Loukika (unconsecrated) fire [5]. In the case of woman also, Jatakarma and other ceremonies (excepting marriage) are performed silently without Vedic Mantras. Vignaneswara, discussing the applicability of the rules as to *prayaschittam* to Sudras thus winds up the discussion:—"अतः स्त्रीशूद्रयोः प्रतिलोमजानांच त्रैवर्णिकवत् अधिकारइति सिद्धम्" "Hence, to women, to Sudras and pratilomajas also there is the right to perform Vratas like the three Varnas." Sudras have their ceremonies done through Brahmins (see Mandlik, Viyavahara Mayukha p. 56). Nilakantha infers from what is called the Nishadha- Sthapathi Nyaya, the right in the Sudra also to have the *Putreshti* performed through the Brahmin (Mandlik, p. 56). As a rule, Sudras perform their ceremonies with texts from Puranas. "Sudras who are knowers of virtue and seek to acquire virtue commit no sin by imitating the doings of the virtuous in exclusion of the Vedic Mantras"—Manu, Chap. X, v. 127. Samskara Kaustubha cited at p. 403 of Mandlik's Vyavahara Mayukha no more justifies the neglect of essential ceremonials than the statement in Ashwalayana Grihya Sutra Adhyaya 1, khandike 4, v 7, *viz.*—Various are the customs of different countries and customs of different villages, those one should observe at the wedding; what however is commonly accepted we shall state." It merely recognises the local

1. See 14 M. 319.
2. Gantama, S.B.E., Vol. II, p. 232, Note.
3. Vyasa Samhita, Ch. I, V. 16.
4. Yajnavalkya, Acharakanda, v. 121.
5. Madana Parijata शूद्रवृत्तिः

variations in the unessentials of religious ceremonial or the variations in the order of such ceremonials.

But this view does not involve the negative of the position that "where by immemorial custom a form of marriage which is not repugnant to the fundamental principles of Hindu law is invariably practised by a particular class, a marriage in such a form is invalid."[1] It only involves the position that such a form is not the Shastraic form—the form known to the texts—and does not come within the categories referred to in the smritis.

There are many reasons to suppose that the 8 forms referred to in Manu are not exhaustive of the types of marriage contemplated by the Smritis themselves. Our own suspicion is that there was a form of civil marriage which did not involve the recital of the Vedic Mantras, which was not approved and yet recognised. For instance Manu says that "the nuptial texts are applied solely to virgins and nowhere among men to females who have lost their virginity—for such females are excluded from religious ceremonies"—Manu, Chap. VIII, v. 226. At another place he says: "Nor has the marriage of a widow ever been mentioned in the Shastras"—Manu. Chap. VIII, v. 65. The text "अनन्यपूर्विका" would seem to prohibit the marriage of a woman already married. But we have the authority of Manu for a woman taking a second husband "if her first husband long remains unheard of or dies, or takes to asceticism or loses his virile power or becomes a degraded person."[1] "Besides lawful wives, seven other sorts of wives called Punarbhus and Swarinis were recognised by the law"—Narada, Chap. XII, v. 45 It would be a strange anomaly to call these marriages approved forms—अनिन्द्य-विवाह—when the Vedic Mantras are not intended for them and they are themselves stigmatised as objectionable. Again it is stated in Manu, Chap. IX, v. 90, that a girl, after 3 years of her attaining puberty, may choose herself a husband without the consent of the guardian. Lastly we have the condemned Pratiloma marriages. It cannot be said that they did not exist. Lengthy discussions on their impropriety and the careful nomenclature of the issues of such union point, on the contrary, to their wide prevalence. It is not impossible also to instance

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1. 14 B. L. R. 298.

from Sanskrit Literature references to such marriages. For instance, Drishtadyumna replies when questioned by Arjuna whether he would give his sister in marriage to a Brahmin :—" ब्राह्मणोवाथराजन्यो वैश्योवा शूद्रएव वा एतेषां यो धनुश्रेष्ठं सज्यंकुर्याद्विजोत्तम। तस्मैप्रदेया भगिनि सत्यमुक्तं मयावचः॥" :—Bharata, Adi Parva, Adhyaya 203, v. 20. (Be it a Brahman, a Kshatriya, a Vaisya or even a Sudra, to him who wields the bow, my sister will be given, I tell thee verily, Brahmin).

The objections to regarding the marriages above referred to as coming under the recognised 8 classes equally apply to customary marriages such as the marriage of deserted wives[1] and of widows.[2] " An elder brother or younger brother who transgresses the rule (as to approaching a brother's widow) is guilty of incest (gurutalgamaanam)"—Manu, Chap. ix, v. 63 It is impossible to recognise this as a binding text and at the same time class the marriage of a widow with the husband's brother[3] which the custom of many communities seems to permit, under the Brahma form because no money is taken by the father. As acknowledged by Mr. Mandlik at p. 397 of his book on Vyavahara Mayukha it seems to be impossible to regard the numerous forms of marriage recognised by custom as comprehended in the approved (अनिन्द्य) forms.

Thus if the question were only between the Brahma and the Asura forms, by reason of the consideration that passed we should have pronounced the marriage in this case to be an Asura marriage, but as we are inclined to think that the Shastraic types do not exhaust the forms of Hindu marriages owing to the absence of the requisite ceremonies, the marriage in question should be regarded as one not coming within the enumerated forms. In either view, as we have indicated already, the property would descend to the father and not to the husband as decided by their Lordships.

B. SITARAMA RAO.

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1. *Virasangappa* v. *Rudrappa* (185) I.L.R 8 Mad. 440, *Jukni* v. *Queen Empress* (1892) I.L.R. 9 Cal. 627.

2. *Kalee Charan Shaw* v. *Dukhi Bibi* (1879) I.L.R. 5 Cal. 692, *Hurry Churn Dass* v. *Nimai Chand Keyal* (1884) 10 Cal. 138.

3. *Poorumnl* v. *Tulseeram* (1884) 3 Agra 350.

NOTES OF INDIAN CASES.

Nelayathakshi Ammal v. The Taluk Board of Mayavaram.—I. L. R. 34 M. 333.—We have great doubt as to the correctness of the decision in this case. Assuming that, according to the terms of the instrument of trust, there is an obligation on the part of every trustee to keep the books of account accessible to the public, as has been assumed by the learned judges in this case, we do not think that that obligation ceased to attach upon the ground that the Board of Revenue were empowered to appoint Taluk Boards as trustees under S. 51 of the Local Boards Act. The learned judges seem to lay some stress upon the fact that the Taluk Board is a statutory body entering upon management under statutory powers. Apparently the learned judges proceed upon the assumption that the case is analogous to compulsory purchases made under the Land Acquisition Act, but here there is no question of any transfer by *vis major*, and the section empowering the Board of Revenue to appoint the Taluk Board does not in any way create new powers or rights or duties in relation to the trust. Assuming that under the section it is competent to the Board of Revenue to appoint the Taluq Board as trustees, the trustees so appointed must be subject to the provisions contained in the instrument or to the conditions therein laid down unless there is anything in the language of the section to make such duties and liabilities inapplicable to the Taluk Board. On the other hand, Cl. 2 of S.51 of the Local Boards Act, taken with Regulation VII of 1817, would seem to make the provisions contained in the instrument of trust applicable to the Taluk Board also. Cl. 2 of S. 51 states that the powers and duties attached to the Board of Revenue also attach to the Taluk Board, and S.13 of the Regulation seems to make the conditions of the endowment binding upon the Board. It is startling to be told that a duty imposed upon a trustee by the instrument of trust should be held to be inapplicable and the instrument of trust and the intentions of the founder should be given the go-bye merely because the section empowers the Board to vest the management in a statutory body. Of course it is open to the legislature to enact that the instruments of trust should be given the go-bye, that their provisions should become inapplicable to the case of a statutory body,

but S. 51 has made no such provision. If the learned judges had stopped with their conclusion that upon the construction of the document of trust the duty to give inspection of accounts was not attachable to succeeding trustees, they might perhaps be right. The learned Judges address themselves to the question whether the Taluk Board may delegate their powers of management. Before considering that question they consider another question involved, viz., whether, under S. 51, the Taluk Board had the right of superintendence merely and not the right of management. The learned Judges consider that the Board of Revenue had the right of management and not superintendence. Whether that position is correct or otherwise, the Taluk Board has, according to the learned Judges, under the Act, not merely the superintendence but also the management. It is the Board of Revenue that is empowered under the section to make over the management of any charitable endowment. Apparently that can only be in cases when the Board of Revenue has the power to make over the management and superintendence. In cases of vacancy and when the provisions of the trust do not govern, it is competent to the Board to appoint a trustee. In such cases apparently the Board of Revenue may appoint the Local Board as trustee. It is not the management merely that ought to be made over, but also the superintendence. The words are "management and superintendence" and not "management or superintendence" as the case may be, so that in cases where the Board is competent to appoint a trustee and it resolves with the written consent of the Governor-in-Council to appoint the Taluk Board as trustee, the Board of Revenue should make over not merely the management but the management and superintendence to the Local Board. If the Taluk Board had the powers of superintendence and the powers of the Board of Revenue in that respect had devolved upon such Local Board, the question whether the Taluk Board had the right to appoint trustees of their own becomes a difficult one for solution.

Venkatachella Pillai v. Taluk Board of Saidapet. I.L.R. 34 M. 375.—The decision in this case is of some importance. The endowment was for feeding 12 Brahmins on every *Dwadasi* day, while there was a direction that a sum of one rupee should be spent every Friday for *archana* and the balance should be given to defray the expenses of butter-milk, betel and nut, and

fans and sugar to people attending a certain festival in the Tiruvathiyur temple. The direction to give butter-milk was held not to convert the trust into a religious charity. Equally so the small provision for *archana*. The substantial provision was to feed Bramins on *Dwadasi* day. A question was raised whether Regulation VII of 1817 was applicable to endowments created after that Regulation. This contention was overruled. The substantial question that was considered was whether the Board of Revenue had the power to transfer to the Taluk Board' under the Local Boards Act, while there was a lawfully appointed trustee and while no steps were taken to remove him. The learned Judges, after a consideration of the provisions of the Regulation and of the powers of the Board of Revenue and the decisions bearing on the point, held that the management could not be made over to the Taluk Board without removing the existing trustee and that the Board could not ignore the rights of existing trustees.

Thattan Kother's son Kunhan v. Mangalath Manakal Narayanan Nambudripad's son Moorthi.—I.L.R. 34 M. 406.—It is a well settled principle of law that in the case of a public charitable trust and where there are several trustees, the consent of a majority is sufficient to validate the transaction, but because the consent of the majority is sufficient and binding, it does not follow that the majority may transact acts without consulting the minority. All members must be consulted and there must be mutual discussion and only then the acts of the majority are binding. A renewal of kanom made by some of the trustees, the *Urulans*, is invalid.

Sreemuth Devasikamoney Pandara Sannadhi *alias* Nataraja Desikar v. K.P.L.S Palaniappa Chettiar.—I. L. R. 34 M. 535:—This is a well considered decision on the question of the powers of trustees of a charity (temple). The learned Judges rightly point out that the observations of Sir *S. Subrahmanya Aiyar* and *Russell* JJ. in I.L.R. 27 M. 465 to the effect that the trustee cannot alienate the *corpus* under any circumstances are too wide and find no warrant from the decisions of the Privy Council. The grant of a permanent lease at an unvarying rate or with a fixed premium is in excess of the powers of the trustee and will be invalid unless special circumstances of necessity are shown.

SUMMARY OF ENGLISH CASES.

Staffordshire and Worcestershire Canal Navigation *v.* Bradley. [1911] 1 Ch. 91.

Right in gross, and right appurtenant to estate—General words in conveyance, effect of—Licensee and Licensor—Estoppel.

An act authorising the construction of a canal granted to each owner of land through which the canal was made, the sole and exclusive right of fishing in so much of the canal as was made in, or through his land, but the right was to be exercised without prejudice or obstruction to the towing paths, banks and other works. *Held*:

(1) The grant of the right of fishery conferred upon the the grantee the right to use the towing paths, etc. as an accessory right.

(2) The right being one to fish without stint, and without reference to the needs of the adjoining lands was a right in gross and not a right appurtenant to the estate adjoining.

(3) Though there was nothing against a transfer of such a right, whether absolutely or by way of lease, it would not pass by mere general words in a deed of conveyance of the adjoining estate.

Although a licensee cannot be heard to dispute the title of the licensor, so long as the relationship of licensor and licensee continues, there is no continuing disability which affects the licensee even when the relationship has determined, and accordingly it was held in this case that the fact that for long years the defendant had recognised the title of the canal company to exclude him from the towing path by paying an annual sum for the privilege of being allowed to fish did not preclude him from setting up his rights, whatever they were, when the relationship of licensor and licensee had ceased between them.

In re Sir S. M. Maryon-Wilson's Estate. [1912] 1 Ch. 55.

Will—Construction—Investment clause—Strict construction—"Colony" or "dependency;" meaning of.

A clause in a will authorising investment in the stocks or securities of any colony or dependency does not authorise investment in the stocks of any of the provinces of the Dominion of

Canada, though they were each of them once a colony. "Dependency" is a wider term than 'colony" and may properly be applied to the Dominion of Canada. The term "colony" is a flexible one and has been used in different senses in different Acts and therefore the definition given in those Acts is of no service in the interpretation of the term when used in a will. Neither of the terms is properly applicable to any part of a single colony or dependency.

Investment clauses purporting to add to the wide range of investments now authorised by law should be construed strictly for the protection of trustees and remaindermen.

In re **Hoyles : Row** *v.* **Jagg.** [1912] 1 Ch. 67.

Trustee—Tenant for life—Unauthorised investment—Benefit of—Remaindermen, not entitled.

A trustee (who happened also to be the tenant for life) made an unauthorised investment and thereby secured to herself a higher rate of interest than could be got by an authorised investment. The remaindermen claimed the difference, but *Swinfen-Eadey* J. held that they were not entitled to it. Their only right was to have the whole of the capital replaced to the trust account and on the life tenant (trustee) making good any deficiency in the capital, she was not liable to refund the difference.

In re **Webster : Pearson** *v.* **Webster.** [1912] 1 Ch. 106.

Charitable gift—Gift to "Ormond Home for Nurses."

The testatrix in this case made a bequest to the "Ormond Home for Nurses," an establishment set up by herself where she maintained qualified nurses to act with her in attending on women of the working class in maternity cases at a small charge to be paid in instalements proportioned to the means of the patients. She expended her own slender income and what she collected from the patients and from pupils that she undertook to train, in maintaining the establishment. The whole thing was done out of philanthropic motives with the object of relieving the suffering of the poor. Under the circumstances *Joyce* J. held that the bequest was for a charitable object and directed a scheme.

British Guardians *v.* Bristol Water Works Co.

[1912] 1 Ch. 111.

Satute, construction—"Private dwelling house."—Workhouse, not.

In this case an attempt was made to establish that a workhouse was "a private dwelling house" within the meaning of a certain Water Works Act (25 & 26 Vict. C. 30) which required the water company to furnish every occupier of a "private dwelling house" within their area with a supply of water for domestic use, and a Scotch case — *Airdrie Coatbridge and District Water Trustees* v. *Flanagan*[1]—was cited, but *Eve* J. felt himself bound to give some meaning to the word "private" and held that a workhouse was a public institution and could not have been intended to be included among "private dwelling houses."

In re **A debtor.** [1912] I. K. B. 53 (C.A.)

Bankruptcy—Non-compliance with notice—Creditors outside England—Notice to pay outside not in accordance with judgment.

In this case a foreign creditor had obtained judgment in an English court against a debtor resident in England. The creditor served a notice on the debtor calling on him to pay the judgment-debt in a place outside England. *Held*: though it was the duty of the debtor to seek the creditor and pay, yet he was not bound to pay outside England.

Macleelland v. **Manchester Corporation, Ltd.**

[1912] 1 K. B. P. 118.

Corporation— Highway— Repair—Negligence — Misfeasance and nonfeasance—Injury to person—Damages.

This was an action against the defendant corporation to recover damages for alleged negligence and misfeasance on their part in the making of a street which ended in a deep ravine and for insufficient lighting and fencing the same. Plaintiff sustained injuries while driving in a motor car along the street which was not sufficiently lighted, by falling over the ravine in consequence of the ravine not being properly fenced. The jury found that the street was a danger to persons using it and the

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1. (1906) 43 S. L. R. 422.

unfenced ravine was a hidden trap. Defendants took no care to warn the public of the existence of the danger. *Held* that plaintiff was entitled to damages on the ground that the defendants had been guilty of misfeasance in that they left the street in a dangerous condition and they acted negligently in the performance of statutory duties.

Eccles & Co. v. Louisville & Nashville Railroad Co.

[1912] 1 K. B. (C. A.) 135.

Practice—Evidence—Action in foreign court—Production of documents, order for—Documents in possession of servant as such—Refusal—Contempt—Attachment.

An order had been made under the Foreign Tribunals Evidence Act for the examination of a certain person and the production by him of certain material documents of which it appeared he had possession, custody and control only in the character of a servant to a master. The master was no party to the proceedings. On the refusal of the servant it was sought to attach him for contempt of court. *Held* by the majority of the court (*Vaughan-Williams* and *Buckley* L. JJ., *Kennedy* L. J. dissenting) that an order for attachment ought not to be made because the court was not satisfied that the documents if produced would not be in violation of his duty to his master even though his master had not expressly forbidden him.

Stoddart v. Union Trust, Limited.

[1912] I. K.B. (C. A.) 181.

Chose in action—Assignment of—Contract induced by fraud—Action by assignee—Priority over the right of the assignee—Damages against assignor for fraud.

In this case one *P* sold some property to the defendants for a sum of money of which a balance of 800 £ remained unpaid and payable by instalments. He assigned that debt to plaintiff for value and gave notice of the assignment to the defendant. The defendant was induced by fraud and misrepresentation to enter into the contract with the vendor. Plaintiff had no notice of the fraud. In an action by plaintiff to recover the money, defendant without claiming to rescind the contract, pleaded that he was induced to enter into the contract by the fraud of the vendor and that he sustained damages and that he was not

liable. He also counter-claimed against the vendor for damages in the event of his being held liable. The jury found that defendant was induced to enter into the contract by the fraud of the vendor and that he sustained damages. The judge gave judgment for the defendant both in plaintiff's action and in the counter-claim. *Held*, that in the circumstances of the case the assignee was entitled to recover the amount without regard to the fraud of the vendor.

Deiton v. Cockle & others. [1912] I. K. B. 206 (C.A.)

Practice—Order for judgment—Judgment signed more than a year after—Notice of intention to proceed—Necessity—O. LXIV, *r.* 13.

Order LXIV, r. 13, provides that the party who desires to proceed in any cause or matter in which there has been no proceeding for one year from the last proceeding shall give one month's notice. In this case an order giving plaintiff leave to sign judgment against defendant was obtained. No further step was taken by plaintiff for more than a year after the date of order. Plaintiff then signed judgment. Defendant applied to set aside judgment on the ground of irregularity for not giving notice. *Held* that the case did not come within the rule and no notice need be given.

Keymer v. Reddy. [1912] I. K. B., P. 215 (C. A.)

Practice—Appearance under protest—Conditional appearance —Enlargement of time.

An English merchant brought an action against a merchant in Madras and obtained leave to serve the writ out of the jurisdiction with a notice calling on him to enter appearance within 90 days. He entered an appearance under protest reserving his right to question the jurisdiction of the court. The Master endorsed on the appearance that appearance would be unconditional unless the defendant applied within a certain time to set aside the writ as application was made within the period. It was contended for the plaintiff that the appearance became unconditional and that it was beyond the power of the court to set it aside. *Held* that the defendant objecting to the jurisdiction has a perfect right to appear under protest; that the practice of the Master to impose that condition has no statutory authority and cannot limit the powers of the court to enlarge the time for objecting to the jurisdiction.

Actiesselska bet Dampskile Hercules v. Grand Trunk Pacific Railway. [1912] I. K. B. 222 (C.A.)

Practice—Foreign Corporation carrying on business in England—Service of writ within England—O. XI, r. 8.

The question in this case was whether the service of a writ on defendants, a foreign corporation carrying on business in England, was a proper service. Defendants were a foreign corporation incorporated for the purpose of constructing a railway line in Canada. Four of the directors resided in England and formed the London Committee. The London Committee entered into contracts for raising loans by means of the issue of bonds and debentures for the purposes of the Corporation. The Committee had a fixed place of business within the jurisdiction. In an action of demurrage a writ was issued by the plaintiff and served on the Secretary of the Committee. *Held* that the defendants were resident in England and carrying on business within the the jurisdiction of the court and that the service was a proper and valid service.

Victor v. Victor. [1912] 1. K. B. P. 247 (C. A.)

Bankruptcy—Proveable debt—Annuity payable to wife under separation deed—Action—Maintainability.

A wife who is a party to a separation deed cannot maintain an action against her husband who has become a bankrupt for the amount of the annuity provided by that deed and for arrears if she had not elected to prove.

JOTTINGS AND CUTTINGS.

City Ordinance requiring Fruit exposed for sale to be protected from Flies and Dust.—A city ordinance of St. Paul requires that all berries, cherries, dates and figs exposed for sale in any store, shop or building shall be protected from flies, and all fruits, berries and candies exposed for sale outside the building, or in any wagon or cart, shall be protected from both flies and dust. Its validity was contested before the Supreme Court of Minnesota on the grounds that it is unreasonable, impossible of performance, in restraint of trade and in conflict with the State and Federal Constitutions. But the Supreme Court finds it objectionable to none of those criticisms, saying :

"If the legislative authorities have the power to regulate the sale of cottolene, baking powder, farm and dairy products, to control butchers, the business of pharmacy, to enforce vaccination of school children, to regulate the smoke nuisance, and compel street car companies to sprinkle their tracks for the protection of the public health, then no question should arise as to the legislative power to protect fruits and candies from being exposed where they will accumulate the germ-laden dust of the streets or permit contact with flies.

"The fact that the enforcement of the ordinance may require some radical change in the method of conducting a business does not necessarily furnish a defence to its enforcement. A privilege long countenanced does not always amount to a personal right. It is a very convenient and perhaps effective method of advertising fruit to display it in front of a store or on the street, in the view of the passer-by; but if, by its accumulation of dirt and germs, the health of the consumer is menaced, then certainly the police power may be invoked to take reasonable steps to abate this source of breeding disease, and, if necessary, may entirely deprive the vendor of fruit of the privilege of exposing it in the open air. The ordinance is a movement in the right direction. It speaks for health and cleanliness, and every right-thinking person ought to be in sympathy with a movement of this kind.

"Properly construed, the ordinance is not designed to be burdensome, and it ought to be possible to provide some method of adequate protection without depriving exhibitors of the right to display their goods in the open. It may not be possible to completely protect fruit from dust, unless it is isolated in such a manner as to keep it out of the air; and, of course, that would result in the deterioration of the fruit, if kept confined too long. A fair meaning its provisions is that fruit kept on exhibition on the outside of a building shall be no more exposed to dust than when it is kept on the inside of a building. The ordinance contemplates that every reasonable precaution should be taken to protect fruit from dust and flies when exposed in the open, and at the same time not result in its deterioration for lack of air. If experiment determines that this result is not possible without shortening the time to which fruit shall be confined, then such inconvenience as may result from it must be assumed by the fruit vendor. The ordinance is bitterly criticised because its provisions include all fruits, such as oranges and bananas, which it is claimed require no protection. While, no

doubt, a distinction may be drawn between such fruits and others, such as berries, it is not for the courts to say that even oranges and bananas should not be protected against the accumulation of dust and the approach of flies. Surely even those fruits are much more wholesome and less dangerous in scattering germs when kept free from flies and dust.

"Something may be said in opposition to the enforcement of such restrictions in the case of wholesale or commission-houses, where boxes are opened and exposed for the temporary purpose of displaying the contents to prospective purchasers. Here again the courts cannot interfere and declare the ordinance void for uncertainty, or as an infringement upon the personal right of such merchants, merely because it will create an inconvenience in their method of conducting business. If experience shows or develops the fact that the enforcement of the ordinance seriously interferes with the conduct of the business of those merchants, redress must be sought with the legislalive power, and not with the courts."—*American Law Review.*

[Certainly we would like a similar bye law being made by all our Indian Municipalities for the protection of exhibited eatables from filth and dust.—ED.]

* * *

Husband and Wife—"Necessaries"—Artificial Teeth.—Artificial teeth made by a dentist for a married woman constituted "necessaries" for which her husband was primarily liable. *Clark v. Tenneson*, 130 N. W. 895. (Wis).—*Ibid.*

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Reception of verdict in absence of accused.—In a recent case in Minnesota a man was being tried on an indictment for assault. He had not been imprisoned, but had given bail. When the jury retired to consider their verdict he went out of the court room, and when they returned between five and six o'clock in the afternoon he did not, nor could he be found, so the court sent them back and ordered them to be locked up all night for he would not receive the verdict in his absence. The next morning at 10·30 the jury were called into court and the following is what took place:

The Court: "Send for the defendant. Now, gentlemen, we will have to ask you to be patient until the defendant arrives."

A Juror: "May I address the court?"

The Court: "Yes; but we cannot take any verdict, you understand."

A Juror: "Well, this seems to be a rather peculiar proceeding. Suppose the defendant does not show up for several days, or weeks; what then? Are we to remain as prisoners?"

The Court: "We do not want to discuss the case in the absence of the defendant. You will not be detained a great while longer. You can remain in your places, if you can be more comfortable. I think we will have the court room cleared for the present, and keep the jury in this room. Would you rather remain here in this room?"

They said they would. An hour later they were again called up by the court.

The Court: "The defendant is not present. Ever since the court was informed that you had agreed on a verdict and were ready to deliver it last night * * * we have been ransacking the town to discover the whereabouts of the defendant. Having exhausted every means to have him here, we will receive the verdict at this time."

The jury then returned the following verdict: 'We, the jury, find the defendant guilty of the crime of assault in the second degree."

The defendant and his sureties were then called and his bond declared forfeited, and a bench warrant issued for his arrest. Sometime after this he was arrested and sentenced to five years in prison and he appealed to have the judgment set aside because the verdict was rendered in his absence. A number of cases were cited in support of his contention, most of which were to the effect that where the accused is in custody he must be present when the verdict is received. And there are a few rulings of Appellate Courts that it is immaterial whether the absence of the accused is voluntary or involuntary and that a verdict cannot be received in his absence under any circumstances. But the Supreme Court of Minnesota affirmed the conviction, saying that the prisoner could not take advantage of his own wrong to defeat the ends of justice, and that the cases which held that he could were "unsound in principle and an apotheosis of technicality."—*The American Law Review.*

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Defamation—Charge of "Unchastity."—A libel charging in effect that the plaintiff, a woman, is keeping a house of prostitution, imputes "unchastity" to her, within the meaning of the statute. "It is possible that such a woman might be esteemed chaste in a

community in which the keeping of a house of prostitution is regarded merely as a breach of etiquette, but not in Minnesota." *Lysacker v. Pub. Co.*; 130 N. W. 850. (Minn.)—*The American Law Review.*

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Elections—Account of Expenditures—Cigars.—A candidate for nomination is not estopped by the fact that he included the price of a box of cigars in his account of expenditures from showing that the use of the cigars is a common courtesy which men extend to their friends without any thought on his part or their part that they would be influenced in their votes. *Re Umbel,* 80 A. 541. (Pa.)—*Ibid.*

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Lawyers of Ancient Greece.—The practice of law in the days and land of Solon, Plato, Demosthenes, Aristotle and Socrates included much that is interesting in the history of jurisprudence. Education provided liberally for logic, philosophy, rhetoric and oratory, all of which help to make up a good lawyer.

Students of Grecian history state that Greece had no institution corresponding to the modern bar. Parties to a suit were supposed at first to conduct their cases in person, but litigants were at liberty to consult friends or experts in the law. These legal men wrote out arguments for their patrons and the latter delivered them in court from memory. Under this system the man of law did not limit his services to one side only, but, by preparing arguments for both parties, could earn two fees.

In the course of time, however, the advocate was allowed to appear for the client, and in certain cases public prosecutors were appointed, whose fees were fixed by law.

In the celebrated Areopagus Court at Athens, in which all high crimes were tried, parties urged their cases personally or by their attorneys; but no ornaments of rhetoric, no attempts to move the passions were allowed. Among the Spartans every one was forced to plead his own cause; no advocates were employed and eloquence was useless.

With the multiplication of causes in the courts and enlargements of the political relations of Athens, the art of eloquence came into much demand and the practice of employing others to advise and conduct a case became more general. By degrees the custom arose for a party to open his case in a brief speech and then to ask permission of the court for his lawyer, who stood beside him, to finish the argument. So, also, if a defendant were disabled from any

cause, the court allowed the advocate to speak in his stead. It is said that many of the existing speeches of the Attic orators were either never delivered at all by their authors or were spoken only as a continuation of an argument opened by a litigant. Demosthenes commenced his career by thus writing speeches for others.

There was no judge to preside. The arbiters were assemblies numbering from five hundred to fifteen hundred men, who were called dicasts, and they decided each case by ballot. These dicasts were judges and jurymen combined and received for their services about nine cents apiece for each day's work. Plato condemned some of the verdicts as the actions of a mob instead of being acts of justice.

While criminal charges seem to have been frequent, yet civil matters also commanded a share of attention, and as the wills of several Grecian philosophers have been preserved, it is presumable that disputes arose about the disposition of property and the like.

Solon's laws were very numerous and covered many minute affairs. He was frequently referred to for an interpretation of a law. He fled from these difficulties by starting on a ten years' travelling tour, having first secured the adoption of his laws for a hundred years. This presumably made increased business for the courts.

Charondas, who prepared the code of a Dorian colony in Italy, enacted that if any man proposed a new law he should enter the assembly with a halter around his neck, and if his proposed law was not adopted he should be hung at once. Here was an effort to diminish litigation, but there is no record that it succeeded.

The laws of Lycurgus were not written, and written laws were, in fact, forbidden. Here was an encouragement for disputes.

In time, the influence of lawyers on the general administration of Justice exercised a very important control, not only over the judicial tribunals, but also as a check to the injustice of pro-consuls, and even to the despotism of the emperors themselves. The beneficial influence of the profession among the Greeks, however, was diminished by a singular state of affairs. While Greek was the language of the Eastern Church, yet Latin was the language employed in legal affairs until after the sixth century. This added to the influence of the clergy with the people, who advised with them in their own tongue.

Concerning the Grecian lawyer's compensation, theory and practice do not seem to have harmonized. In theory, the original idea was that a lawyer who appeared in court on behalf of a litigan

should do so without a fee; but the theory seems to have been frequently followed by the breach of it. Many lawyers of Greece had large incomes from the practice of their profession. The public advocates, however—those who appeared for a city or community—seemed to have received their compensation chiefly in the honor of the office, as their fees were fixed by law at a drachma each for every case they managed.—*Albany Law Journal.*

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How to Prepare a Brief.—In the preparation of a brief a lawyer ought to be thoroughly imbued with the spirit of the law, and he ought to have an intimate knowledge of the theory of the law, in this respect, that each case is to be tried but determined on its individual merits, and that the judicial precedents applicable thereto are evidence of what the law is on like points and questions, which the courts are bound to follow, not only on questions precisely like the one which was first determined but also on those which, however different in their origin or special circumstances, stand, or are considered to stand, upon the same principle. He must know the weight and effect of precedents. He must remember that inductive and deductive reasoning by virtue of the applicability of principles to facts is a part of our system of law, and furthermore he must be cognizant of the responsibility resting upon him in the preparation of a brief, for great care is requisite, in order that nothing be neglected, omitted, or added to endanger the cause.

The question now arises: What is a brief? Originally a brief was "a writ whereby a man was summoned to answer any action, or it was any precept of the king in writing issuing out of any court, whereby he commanded any suing to be done." (Cowel). The writ consisted of a concise statement of the plaintiff's case. Later on the phrase "to hold a brief" meant to be retained as counsel in a case, to argue for. "To take a brief" meant to accept the conduct of a case. In early times a briefless lawyer was the target of much wit, thereby showing that a brief in the above sense was of the utmost importance to a lawyer. There is no doubt but that the brief in its modern sense and form grew out of the writ. A brief, in the modern legal sense, is either an abridged or detailed statement in systematic order of a plaintiff's or defendant's case, prepared by the attorneys, for the information of the court and for the attorneys' instruction and that of counsel in a trial at law; wherein is contained a clear, correct and concise statement of facts, a statement of the points and questions arising from the facts,

with the authorities cited in their support, or a statement of the errors, exceptions and objections cited upon an appeal, with the necessary arguments and citation of authorities, and wherein proper answers are made to whatever may be objected against the client's cause. The object of a brief is to inform the court, to instruct the attorney and counsel, as well as to act as a digest of the case.

Briefs may be divided into two kinds: Trial and appeal briefs, Although one authority defines a trial brief as a formal memorandum in systematic order, but concisely expressed, of the points of law or of fact to be developed or expanded in argument, or to be pursued in the examination of a witness, still it is maintained, and rightly, that a trial brief ought to contain a brief statement of the facts and the theory of the case, all the points and questions likely to be raised in pleading, evid nce and practice in the particular case at bar all the principles of the substantive law applicable thereto, as well as a memorandum of the proofs and arguments. In the preparation of a trial brief the following steps should be followed:

1. A clear and succinct statement of the facts in logical sequence.

2. A well defined theory formulated in accordance with the facts.

3. A statement of the general principles of law involved in the case.

4. A clear, concise statement of the points, questions and propositions relied upon, with their appropriate authorities cited.

5. A memorandum of the nature and kind of proof.

6. A memorandum of the arguments.

7. A note on the anticipated line of defense.

It is the opinion of eminent practitioners that a lawyer's trial brief, ought to be prepared with as much care and formality as an appeal brief, excepting the question of printing.

Courts of last resort usually set forth in their rules the manner and form in which they wish the briefs on appeal to be prepared. For example: Rule 61 of the Supreme Court of Michigan reads as follows: "The party bringing a case into this court shall, in his brief, make a clear and concise statement of the case, and of the errors upon which he relies." It will, therefore, be seen that the brief of the appellant may be divided into three parts, each one of which is essential,

1. A clear, correct and concise statement of the facts.

2. A statement clearly made, point by point, of the errors relied upon.

3. The argument of the case.—*The Law Student's Helper.*

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Hot Potato when a Deadly Weapon?—It appears that a hot potato if it is hot enough may be classed as a deadly weapon when used to inflict injury. A Chicago indictment reads as follows:

"Frank Smith, late of the city of Chicago, did on January 24 1911, at the city of Chicago, county of Cook, State of Illinois, aforesaid, then and there being, did then and there with a certain instrument commonly called hot baked potato, said hot baked potato being a dangerous and deadly weapon, without any considerable provocation whatever and under circumstances showing an abandoned and malignant heart, did assault said Anna Hygsick with intent to do great bodily injury."

Commenting on this case, a paper of that city tells of a sixteenth century citizen of old Amsterdam who charged his wife Katrina with "a long continuous daily assault upon his peace and very life with a most sharp, hartful and cutting knife, to wit, her tongue, which truly he doth fear will make him dead."

There is a record of a Spanish case in the fifteenth century in which a man of some literary notoriety entered complaint against an amateur poet who had more than once "assaulted" him "by reading to him, in a loud voice, his vile, idiotic, so-called poems more murderous than sword or dagger, bludgeon, mace or axe."-*Ibid.*

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Libel and Right of Privacy.—The legal machinery of the state of Washington recently found its wheels locked and unable to afford any aid to a young lady whose photograph had been published in a newspaper in connection with an article regarding the knavery of her father in the fraudulent use of the mails. She was, of course, an innocent party, but, unlike the innocent bystander who is shot in a street brawl, there was no remedy. The statute provided that a writing which shall expose any living person to hatred, contempt, ridicule, or obloquy, or to deprive him of the benefit of public confidence or social intercourse, shall be considered libellous, and that it shall be sufficient to allege in the complaint that the publication is written of or concerning plaintiff (Rem. & Bal. Code, Ss. 292, 2424). As the defamatory article was not about the young lady in question

the Washington Supreme Court held that she had no remedy under the libel statute, and, though it was admitted by all parties that she had been wronged, the court said that it could not apply the so-called right of privacy doctrine to this case, as it has been applied by precedent; that therefore there was no remedy under the present law; that "it is a subject for legislation and to the legislative body an appeal might be so framed that in the future the names of the innocent and unnoffending, as well as their likenesses, should not be linked with those whose relations to the public have made them and their reputations in a sense the common property of men." Hillman v. Star Pub. Co., 117 Pacific Reporter, 594.'—*The Law Student's Helper.*

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Pinning Him Down.—In a little sequestered country town, where the court of justice is over the general store, and where the judge is an old, grizzled farmer, thoroughly familiar with pitching hay and milking cows, but having a very limited knowledge of the law, the prisoner had pleaded "Not guilty" to a charge of burglary. The lawyer for the prosecution was endeavoring to show the court that the accused was a man of low character.

"What were you doing the night before the robbery?" he questioned severely.

"I was playing pinochle with Jed Parker and another feller," answered the prisoner evasively.

"Ah, I thought so!" shouted the lawyer triumphantly. "Playing cards, and with that loafer, Jed Parker! Gambling and in bad company! But you mention a third party, sir. Who was the other good-for-nothing?"

The prisoner hesitated.

"Answer me!" bellowed the lawyer."

"Wa-al, sir, if ye must know," said the accused, "it was the Judge here."—*Judge's Library.*—*Ibid.*

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The Centenary of Charles Dickens.—The interesting paper of Mr. George Packard on the Lawyers of Charles Dickens, published in our July number, reminded us that this year occurs the centenary of the great novelist. And it is to be celebrated, as Thackeray's was last year, by the English bar. For Dickens, like Thackeray, says the *Law Journal*, was a member of the Middle Temple, though he was never called to the Bar. He entered his name as a student in 1839, eight years after the author of Pendennis took his first meal

in the famous old Hall, Though Dickens' connection with the Middle Temple was less intimate than Thackeray's, his association with the Law may be said to have been closer. No novelist has created so many lawyers; nearly forty are to be met with in his pages. "Jarndyce v. Jarndyce" and "Bardell v. Pickwick" are better known than any law suits actually tried in the courts. If the fountain—which the late Lord Coleridge once irreverently described as a "squirt"—is the most familiar thing in the Temple, it is because Tom Pinch and Ruth were wont to meet by its side. Dickens, when he abandoned his intention of joining the Bar, succeeded in doing a very notable thing. This is how the late Sir Frank Lockwood, in his lecture on "The Law and Lawyers of 'Pickwick,'" described it: "He had eaten the five or six dinners which is part of the necessary legal education for a barrister, and he had suffered in consequence the usual pangs of indigestion. . . . Dickens did that which I venture to think but few have done, for, giving up all idea of pursuing a legal education, and finding that the dinners did not agree with him, he got back from the Inns of Court some of the money which he had deposited. You are all familiar with the process which is known as getting butter out of a dog's mouth; I venture to think that that is an easy thing compared with getting money back from an Inn of Court." All the four Inns might join in paying a tribute to Dickens' memory, for he found a home for his creations in all of them. Sydney Carton, Eugene Wrayburn, Sir John Chester, and Pip are among those who lived in the Temple; Serjeant Snubbin had his chambers in Lincoln's Inn, and Messrs. Kenge and Carby, in whose employ Mr. Guppy was, had their offices there; while Traddles, as well as Mr. Pickwick's solicitor, Mr. Perker, was among the tenants of Gray's Inn. The Benchers of Gray's Inn may, perhaps, be forgiven if they join rather less heartily in the Dickens celebrations than the Benchers of the Middle Temple: "I look upon Gray's Inn generally as one of the most depressing institutions in brick and mortar known to the children of men"—this is the unfavorable judgment passed by Dickens upon the Inn in "The Uncommercial Traveller" There can be few Londoners who agree with it. For the other branch of the profession, too, the Dickens centenary will have a special interest. Like one of his well-known characters, Mr. Guppy, Dickens was himself a solicitor's clerk. For eighteen months he was in the service of Mr. Edward Blackmore, whose offices were in Gray's Inn, earning, when he brought his career as an office-boy to a close, the respectable wage of 15s. a week. There were, indeed, few points of legal life which

he did not touch. He was a reporter in the Lord Chancellor's Court in his struggling days, and he was a Chancery litigant in his prosperous ones. He successfully applied to the much abused court in 1844 for protection against piracies of "A Christmas Carol" and "Martin Chuzzlewit."—*American Law Review.*

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Cemetery, not a nuisance per se.—A cemetery, it is held, in a Georgia case, is not a nuisance *per se*. Cemeteries, the court says, are a necessity. A place where the dead may be given decent Christian burial must be established, and the location of such must necessarily be upon some tract of land more or less suitable and commodious; and it is impossible to find a tract of land that is not contiguous to the lands of some one else. And inasmuch as cemeteries must be established, and should be located where they are reasonably accessible, it is rarely possible to so fix their location, when they are designed for the use of a populous town or city, where they will not be in more or less proximity to some residence; and unless the soil of the land used as a cemetery and that of the contiguous owners is such as to cause a drainage which will produce a contamination of the waters, thereby putting in jeopardy the health or lives of the owners of the contiguous lands and the health of their families, or unless the air would be contaminated, courts of equity will not interfere by the grant of injunctive relief to prevent the establishment and location of the cemetery. Cemeteries are not *per se* nuisances, and it is only in exceptional cases that their establishment and location would be enjoined by a court of equity. Where it is shown that the location of a cemetery in some place would contaminate the water used for drinking purposes, or for watering cattle, or other domestic animals, and that thereby the health of the residents upon the adjacent lands would be endangered, and that some other place sufficiently convenient and accessible could be procured, and that the location of the cemetery at the latter place is not objectionable upon any valid ground, equity might interfere to prevent its location in the place where it is shown there are sound reasons for apprehending danger to the life or health of those residing near by.—*Ibid.*

[The above reminds us of the case in *Queen-Empress* v. *Saminatha Pillai*—19 M. 464 = 6 M. L. J. 181 :—ED.]

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The Evidence of Bloodhounds.—In a trial for murder in Kansas it was insisted on appeal that the evidence of the tracking of the

prisoner by certain bloodhounds was improperly admitted and improperly instructed upon by the trial court. The court had instructed the jury as follows: "Evidence has come to you tending to prove that some 15 or 16 hours after it is alleged the deceased was shot, bloodhounds were put on certain tracks, believed to have been made by the one guilty of the shooting; that they followed him for several miles, ending their trailing at the home of James Huntington, where defendant was staying. Before this evidence can be considered by you as a circumstance tending to connect the defendant with the crime, it must be shown that the particular dogs were and are reliable and accurate and certain in following the trail of human footsteps. So, if you find from the evidence given touching the matter here that they were and are reliable and accurate in this regard, then the evidence of their work and its result on the day in question may be considered by you, together with all the other evidence in the case as a circumstance determining the guilt of the defendant." The Supreme Court holds that this instruction was eminently proper and correctly explained the law of the subject.—*The American Law Review.*

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A Spite Fence, Dogs and a Court Decree.—The right of an owner of property to build thereon a fence as high as he pleases which has been often upheld even in the case of a "spite fence" must not be exercised as a reprisal for a judicial decree. In *Wilson v. Irwin,* the plaintiffs, two women, resided next door to the defendant, who kept dog kennels and a large number of dogs. The dogs being very annoying, the plaintiffs asked an injunction against the keeping of the dog kennels on the ground that they were a nuisance. The court decreed in their favour and restrained the defendant from maintaining the kennels for breeding purposes, or from keeping any dogs that bark unnecessarily or otherwise annoy the neighbours, and requiring him to remove all the dogs but one. While the suit was pending, the defendant, to deter the plaintiffs from further prosecuting the suit, said to them, "If you women give me any trouble and make me move my dogs, I am going to put up a 20-foot fence." And when they won their suit, he put up a 20-foot fence between the two lots. The plaintiff's now state to the court that he built the fence for the purpose of deterring them from prosecuting the suit; that it was wholly unnecessary and useless, and was also built for the purpose of resisting and rendering difficult the enforcement of the court's injunction, and to punish them for resorting to law, by making the property unsightly and driving away tenants, and that the fence

was a nuisance to them and to the entire neighbourhood. The Court of Appeal of Kentucky ordered the defendant to remove the fence, saying:

"The question is: will the court sit quietly by and permit a litigant to annoy and harass his adversary in this manner, in the hope of deterring his adversary from seeking protection from the court? The fence was erected following a threat, and after the court had ordered the temporary injunction prohibiting the continuation of the dog-breeding establishment. The court's first duty is to protect its litigants, and to permit nothing to be done which tends to the miscarriage of justice. One may have the right to build a spite fence, but not for the purpose of driving a litigant from a court of justice. One may give a person $ 50 to leave the state, but not to prevent him from testifying. Again, one may sue another; but he may not threaten to do so if he comes into the jurisdiction to testify. The question of contempt in the matter at bar is not difficult of distinction from the case of a complaining neighbor against one who has built a fence which excludes his light and air. The doctrine of ancient light is not involved here, but the doctrine of having causes in court heard and disposed of in an orderly way, free from duress and oppression. . . . Justice cannot properly be administered if litigants are intimidated. The courts must be free, and it is the duty of the court to protect litigants, no less than witnesses, that the orderly administration of justice shall not be impeded. The record amply sustains the court's findings of fact, and on these findings he properly required the fence to be removed. It is insisted that Wilson had the right to build a fence on his own land, and build it as high as he pleased; but he had no right to interfere with the administration of justice and he may be required to remove anything that was built to interfere with justice."—*The American Law Review.*

CONTEMPORARY LEGAL LITERATURE.

The January part of the *Harvard Law Review* opens with a learned article on "RELEASES AND COVENANTS NOT TO SUE JOINT, OR JOINT AND SEVERAL DEBTORS" in which the writer states and discusses the present law as regards:—(1) Effect of a release upon the creditor's right. (2) Effect of a covenant not to sue or a qualified release upon the creditor's right. (3) Effect of covenants and

qualified releases where one joint debtor is a surety. (4) Importance of the creditor's knowledge of a suretyship relation between joint debtors. (5) Whether consideration received from one joint debtor must be credited in proceedings against another. (6) Rights of a joint debtor who has received a covenant that he shall not be sued, or a qualified release. The article is a good summary of the whole law upon the subject deduced from English and American cases, chiefly the latter.

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In the same number, there is an article entitled : "SHOULD THE LAW TEACHER PRACTISE LAW" by Professor Kales in which the writer points out that:—(1) Though it is advisable that a teacher should also be a practising lawyer he ought not to handle cases himself but must only serve the needs of lawyers who have clients and who employ the law teacher because of his expert and special knowledge. (2) That the law teacher's practice must be to some extent specialised and very naturally in the line of the subject which he teaches. (3) That the law teacher should be a successful original thinker and must be able to determine what problems are vital and what views are sound and to impart those views to the students. (4) That though it may not be given to every teacher to bring out original and authoritative text books, he must be able to at least revise old text books and write encyclopædic articles of a dignified character. (5) That it is only such a teacher rather than one who is purely confined to teaching in the law school that is required for our modern necessities. (6) That the objections raised against the expediency of a law teacher practising at the bar are not really well grounded as steps could be taken easily to retain him for the benefit of the school consistently with requiring him to test the soundness of his legal principles in courts of law and in better minds than his at the bar.

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"LEGAL CAUSE IN ACTIONS OF TORT" is another subject on which articles have been appearing in three numbers of the *Harvard Law Review* ending with the February part, 1912, in which Jeremiah Smith discusses the causes of liability in tort under the two well-known rules: (1) the damage to plaintiff must be an actual consequence

of defendant's tortious act; (2) this consequence (the happening of the damage) must have been reasonably foreseeable at the time of doing the tortious act, and concludes as follows:—

Suppose that, in establishing a general rule upon this subject of causation in actions of tort, we are confined to a choice between two tests. First the rule of liability for probable consequences only; second, the "general rule" we have suggested ("defendant's tort must have been a substantial factor in subjecting plaintiff to damage complained of").

If either of these tests is adopted as an exclusive general rule to be applied in all cases it is likely that practical injustice will occasionally result. Under the first test recovery may sometimes be unjustly denied. Under the second test recovery may sometimes be unjustly permitted. If injustice will appreciably result more frequently under one of these tests than under the other, then the test under which this happens should be discarded. Neither logic nor legal symmetry furnishes conclusive reasons for adopting a rule of law. The decisive consideration is that furnished by experience—the practical working of a rule.

Our own impression is that practical injustice would result more frequently from the operation of the first test, and if we are compelled to choose one of the two we should adopt the second test.

Suppose, however, that there is no difference between the two tests as to practical injustice. Suppose that the number of unjust results from the application of one test will be exactly equal to the number under the other test. Under the one test there will be the risk that recovery may occasionally be unjustly denied to the plaintiff. Under the other test, there will be the risk that in an equal number of instances, a recovery may be unjustly allowed against the defendant. Whichever test then is adopted, one party or the other has got to run a risk of occasional injustice. Upon which of the two parties ought this risk to be imposed? Upon the innocent plaintiff or the tortious defendant? In the words of Judge Christiancy in *Allison* v. *Chandler* "* * * Does not sound policy require that the risk should be thrown upon the wrong-doer instead of the injured party? The nature of the case is such as the wrong-doer has chosen to make it, and upon every principle of justice he is the party who

should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case and the difficulty of accurately estimating the results of his own wrongful act. Upon what principle of right can courts of justice assume—not simply to divide this risk which would be thus far unjust but to relieve the wrong-doer from it entirely—and throw the whole upon the innocent and injured party ?"

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"IS LAW THE EXPRESSION OF CLASS SELFISHNESS?" is another article in the February number of the *Harvard Law Review* in which the writer refutes the correctness of the old answer to the question in the affirmative and concludes as follows:—It would be a strange situation surely if the courts were at the same time enemies and partisans of the employer class. Is it not more probable that they were neither enemies nor partisans, but that, in formulating the general doctrine of the master's liability to strangers as well as the special fellow servant doctrines, they were striving to do what seemed to them right and wise? They may have erred. Is there any evidence that they were actuated by discreditable or selfish motives? The writer holds no brief for the impeachability of judges or the infallibility of courts. But a careful and, he trusts, a candid study of the decisions of English and American courts during many years, has convinced him that the body of law thus developed is not the expression of class selfishness. On the contrary it seems to him an honest and in the main an adequate system of principles under which justice can be fairly administered between litigants without respect to class, rank or condition.

Acknowledgments.

We beg to acknowledge receipt of the following publications:—

Allahabad Law Journal for	March 1912.
Calcutta Weekly Notes	Do.
The Law Journal	Do.

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sections 100 and 101 of the Indian Succession Act, as the case may be.

Bequest to person by particular description who is not in existence at the testator's death.

3. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers to the description, the bequest is void.

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the Marumakkatayam law, resident within the limits of the Madras Presidency and to transfers and wills made by such persons resident outside those limits so far as they relate to property situate within those limits.

Statements of Objects and Reasons.

The Judicial Committee of the Privy Council in *Tagore v. Tagore* (9 Bengal Law Reports 377) held that devises in favour of persons not in existence at the time of the death of the testator are invalid. That decision though based upon a text of *Dayabagha, Chapter I, Placitum* 1, has been held to apply to wills made by persons governed by the Mitakshara Law. The principle of this decision has also been extended to transfers *inter vivos.* The result is that if a Hindu wishes to settle property upon his sons, daughters, brothers or sisters for life with remainder over to their children, the bequest will not take effect except in favour of those who are in existence at the date of the gift if the settlement is *inter vivos* or at the date of the death of the settlor if it is by a testamentary instrument:. The intention of the settlor in either case being to benefit all the children including those who may be born after the date of the gift or after the death of the testator as the case may be, the effect of the rulings already referred will be to defeat the said intention. Provisions of this kind are very common in deeds and wills executed by Hindus in this part of India and innumerable decisions have been passed invalidating such bequests on the strength of the *Tagore Case.* Whether the decision in the *Tagore Case* is right or wrong, it is necessary that the law should be brought into agreement with the sentiments and wishes of the community: The object of this bill is to do that. It makes no attempt to interfere with the laws of inheritance. It merely seeks to prevent the intention of the donor or testator being defeated. It is so framed as to carry out the wishes of the donor or testator subject to the very same limitations which exist under the English Law. It is intended to confer the same benefits on Hindu settlors and testators as the Transfer of Property Act by section 14 confers on communities other than Hindu or Mahomedan.

Section 2 while enunciating the general rule is so worded as not to contravene the rule against perpetuities contained in sections 13 and 14 of the Transfer of Property Act and in sections 100 and 101 of the Indian Succession Act. The exception to section 3 brings the rule in conformity with similar provisions in the Indian Succession Act.

CONTEMPORARY LEGAL LITERATURE.

The Duty of the Lawyer as an Officer of the Court:—There is very interesting article on the duty of the lawyer as an officer of the court, being the Presidential address delivered last December by Christian Doerfler before the Milwauker County Bar Association.

He advocates the enrolment of the lawyer as a court officer and his being paid out of the public treasury so that he may owe no obligation to any one outside the public and that he may not owe any to clients too. The proposition is thus formulated: "That the duty that counsel owes to the court and to the public be increased, and that the duty which he owes to his client be decreased proportionately, so that private interests shall not have the power to induce an officer of the court to trespass upon the rights of the public."

Literature and the Bench.—There is another interesting article headed "Literature and the Bench" which was the subject of some witty discussion by some delightful diners at the Author's Club on the 4th of December last and where Sir Frederick Pollock was the guest of honor. In the words of Sir Frederick Pollock the proportion of legal writers who try to write good English is increasing both in England and in America in the handling of law in a scholarly and literary fashion. Among English lawyers who so wrote may be mentioned Lords Mansfield and Blackstone, in the earlier and in the later part of the eighteenth century. Of the carefully written judgments many were written by good scholars, not a few being a series of contributions to political and historical science beyond legal technicality. Sir Frederick Pollock says that the 2nd and 3rd quarters of the nineteenth century formed a golden age of great English Judges. He says of them :—"They handled the language partly with finished scholarship and partly with mother wit, sharpened by long experience of affairs and advocacy. Not striving to adorn their plain business, they could rise to the height of great occasions."

Among modern judges he marks out Justice Willes and picks out two living learned friends, one on each side of the Atlantic, Justice Holmes, of the Supreme Court at Washington, and Professor Dicey of Oxford.